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IN THE

# Supreme Court of the United States

..... TERM, 19.57

No. ~~1057~~ 163

JAMES D. RUSSO,

Petitioner,

*against*

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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JAMES D. RUSSO,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Eastern District of New York.

## Opinions Below

The opinion of the United States District Court for the Eastern District of New York (App. 42a)* is reported at 19 F.R.D. 278 (E.D.N.Y. 1956). The opinion of the Court of Appeals for the Second Circuit is reported at 241 F. 2d 285 (2nd Cir. 1957).

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* Parenthetical appendix notations refer to Appendix in the Court of Appeals.

## Jurisdiction

The appeal to the Court of Appeals for the Second Circuit was decided February 8, 1957. The petition for a rehearing was denied and the mandate issued on March 8, 1957. Copies of the opinion and order denying rehearing are appended to this petition in the Appendix at pages 27 and 32. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

## Questions Presented

1. Whether the opinion of the Court of Appeals for the Second Circuit which conflicts with the holding of the Court of Appeals for the Ninth Circuit on constitutional issues, and which affirms the summary denial by the District Court of petitioner's motion to suppress evidence without benefit of hearing, or deposition for the purpose of resolving issues of fact, was error.

2. Whether the acts of a layman in purporting to represent a taxpayer in a criminal tax matter constitute the unlawful practice of law.

3. Whether the evidence, unlawfully acquired through the participation of government agents in the improper "representation" of petitioner by one who engaged in unlawful practice of law and appeared before the Treasury Department in violation of Federal Statute and Regulation, should have been suppressed.

4. Whether the acts of the agents in disguising the true nature and purpose of their criminal investigation and in using improper representation of the taxpayer for the furtherance of their purpose deprived the taxpayer of his constitutional rights under the Fourth and Fifth Amendments to the Constitution and his rights to counsel under the Constitution and Statute.

## Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit arising out of the affirmance by that court of an order of the United States District Court for the Eastern District of New York denying petitioner's motion for an order suppressing certain evidence and the leads and clues obtained therefrom and directing the return of petitioner's papers, books, etc., as well as copies made therefrom. This petition also relates to the denial of a hearing below on the foregoing application and the denial of petitioner's motion for leave to take the deposition of William Mack, a person having intimate knowledge of facts upon which the application was based.

James D. Russo, the petitioner herein, is an assistant clerk in the office of the Clerk of the County of Richmond (App. 5a) and he has for some time prior to the instant proceeding tried to supplement his earnings by occasional insurance brokerage and by assisting various people in the preparation of their income tax returns (App. 5a, 19a, 22a).

In the late spring of 1953 agents of the Internal Revenue Service manifested their first interest in petitioner's personal books, records and income tax returns.

At this time Mr. Russo engaged one William Mack, who held himself out to be an accountant, to review his books and records for 1949, 1950 and 1951 (App. 6a, 33a, 34a). At this point Mr. Russo knew nothing of any criminal investigation of his own tax returns (App. 6a). Before Mack was engaged in the early part of 1953, he had never served Mr. Russo as accountant or in any other capacity and was engaged for the sole purpose of representing the taxpayer in the review of his own tax returns for the years 1949, 1950 and 1951 (App. 9a).

Mr. Russo delivered his records to Mack, which records consisted of cancelled checks, bank statements and the like (App. 6a). Throughout the latter part of 1953 and continuing through 1954 and the first part of 1955 Mack was ostensibly engaged in consultation with the agents of the Internal Revenue Service making arguments of law and fact and filing various papers on the matters, the exact nature and contents of which were unknown to Mr. Russo at the time (App. 7a, 12a). Mr. Russo was given to understand that Mack's job was to make a recomputation of his income and that the additional tax, if any, would in due course be determined (App. 7a).

This understanding of the nature of the investigation was given additional support and impetus on several occasions of which the record contains two outstanding examples. One such is the letter dated July 12, 1954, annexed as Exhibit A to the original affidavit of Mr. Russo (App. 15a *et seq.*) from the District Director of Internal Revenue. It will be seen that this letter was received in the midst of the examination and Mack's activity. This letter from the District Director directs that all replies be made to the Audit Division at 90 Church Street. It also directs the taxpayer to contact Internal Revenue Agent Thomas J. Ginnane should such contact be necessary.

The other example is Exhibit B annexed to the same affidavit (App. 17a) which is also signed by a person characterized as an Internal Revenue Agent and describes his activities as a tax examination. These two documents are entirely devoid of any mention of a Special Agent, throughout refer to their work in terms of "audit" or "examination," and nowhere do the words "investigation" or "fraud" appear. It is also noteworthy that the letter was sent from 90 Church Street rather than 253 Broadway, which was then well known as the headquarters of the special agents or "T" men. (The proper character of the examination as a joint fraud investigation supervised by

a special agent whose duty it is to gather proof to support a criminal charge of income tax evasion was by affirmatively deceptive techniques, obscured and disguised to give the appearance of a routine audit conducted by an Internal Revenue Agent whose duty it is to conduct ordinary tax examinations and make civil tax settlements in the case of underpayment. *Russo* v. *U. S.*, 241 F. 2d 285 (2nd Cir. 1957); Official Manual of the Internal Revenue Service; *U. S.* v. *Wolrich*, 129 F. Supp. 528 (S. D. N. Y. 1955).

During this time Mack was never required to exhibit a Treasury card (App. 8a); in fact, he was not entitled to practice before the Treasury Department, and was neither an attorney nor a certified public accountant (App. 10a). Nevertheless, he proceeded to deal with the agents in what Russo had supposed was an "audit" of the returns, which he represented would be followed by a settlement on the basis of a payment of a deficiency, if any were found. It was only subsequent to the completion of the agent's investigation that Mr. Russo learned that Skolnick was a special agent of the Internal Revenue Service and that he was conducting a joint investigation in which he was responsible for the procurement of proof to establish a criminal charge of income tax evasion against him. Mr. Russo never met with the agent during the period between June, 1953 and the early spring of 1955 (App. 9a), December 16, 1954, according to Skolnick (App. 25a).

The use by Special Agent Skolnick of Mack and of two Internal Revenue Agents as his foils was a skillful device to keep the true nature of his work from the taxpayer (App. 10a, 11a). The agent's use of Mack as co-investigator is demonstrated in the excerpt from the affidavit prepared for Mack by the special agent (App. 11a, 12a), in which Mack describes how, at the request of the agent, he analyzed the records, made up figures, summarized them on work sheets, and delivered his work sheets and analyses together with the checks, statements and other records of

the taxpayer to the agent. These were subsequently returned to Mack and later re-examined at Mack's office (App. 11a, 12a). The taxpayer never saw these papers (App. 7a, 8a, 12a).

Revenue Agent Foley confirms that he obtained Russo's books and records from Mack, as well as work sheets and analyses prepared by Mack (App. 19a). Among the information which Foley tells us that Mack gave him were "the names of insurance companies with whom Mr. Russo did business" (App. 21a).

Thus, the Special Agent-Revenue Agent team was in operation as early as September, 1952, according to the affidavits of Skolnick (App. 22a) and Foley (App. 19a). Mack joined their operation in the spring of 1953 (App. 34a). *The first contact with an insurance company was in August, 1953* (App. 25a), *almost a year after the joint investigation team was in operation and months after Mack undertook to represent Russo. The inference that Mack was the source of the information on which the agents acted is clear.*

In the spring of 1955, the taxpayer was directed to appear before Skolnick at 253 Broadway (App. 7a). Mack told Russo that he (Mack) should accompany him, and after their arrival Skolnick inquired whether Mack had a card authorizing him to practice before the Treasury Department. Mr. Mack said that he did not, that Skolnick knew he did not, and that in the light of Mack's extended handling of this case, Mack did not understand Skolnick's sudden concern at this time. Skolnick stated that Mack's lack of the Treasury card did not matter, and proceeded with the interrogation with by far the greater part of the questions being answered by Mack (App. 7a, 8a). This was the first time that Russo ever heard of the necessity for admission to practice before the Treasury, and Mack's disability in that regard (App. 8a). Mack argued many points of fact and law, the substance of which was not understood

by Mr. Russo (App. 8a). Subsequently, in September of 1955, for a reason the Government's answering affidavits did not choose to explain, Mack was called to the office of Special Agent Skolnick and at his behest executed an affidavit reporting his investigation of his own "client." (App. 8a-12a).

It is apparent from the affidavits of Skolnick and Foley (App. 19a, 22a) that Mr. Russo's matter was treated as a joint fraud investigation from September, 1952, but that affirmative steps were taken to give the proceeding the appearance of a routine audit. Mr. Russo did not at any time during the relevant parts of the investigation know that Mr. Skolnick was a Special Agent whose duty it was to gather evidence to support a criminal charge against him (App. 10a). Nor does it appear that Mack knew at any relevant time that Special Agent Skolnick had that as his purpose. It was apparently intended to avoid this realization by having receipts and letters signed by Internal Revenue Agents rather than by the Special Agent.

At no time was Mack authorized to deal with agents of the Treasury Department engaged in a criminal investigation, nor was he authorized to waive any of Russo's rights guaranteed to him as a private person under the Constitution (App. 10a; 11a).

It should be mentioned that in 1952 and prior to the investigation of petitioner's own return he was requested to assist Government agents to rectify errors which they said existed in certain income tax returns petitioner had prepared for others. Mr. Russo rendered such assistance and in the course thereof had counsel (App. 36a), who was not admitted to practice before the treasury (App. 41a). At the ostensible close of such investigation the counsel withdrew because he did not feel qualified to handle the tax matter (App. 34a, 36a) and Mr. Russo was thanked for his assistance (App. 6a).

## REASONS FOR GRANTING THE WRIT

### POINT I

**The summary denial of petitioner's application without benefit of hearing or deposition despite the existence of issues of fact was error and in conflict with decision of Ninth Circuit.**

The decision below should be reviewed because it erroneously affirmed the summary denial of petitioner's motion without benefit of hearing or deposition despite the existence of basic issues of fact and the lack of testimony of the principal witness.

In so doing, the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Heffritz v. United States*, 240 F. 2d 109 (9th Cir. 1956).

The most cursory reading of the record discloses that the Government's version of the transactions which took place during the periods which are relevant to petitioner's motion to suppress differs sharply from that of petitioner's.

Some of these issues are set forth below:

1. The petitioner characterizes his first contact with the Government agents as one related solely and entirely to the question of the income tax returns of other taxpayers (App. 5a, 6a, 39a). Skolnick describes an entirely different meeting in which it is claimed that matters pertaining to Mr. Russo's personal income tax were discussed (App. 22a). Mr. Russo subsequently reaffirmed his version of the meeting as originally stated (App. 39a). There is a sharp issue as to the basic nature and origination of the investigation raised by the affidavits of Russo and Skolnick. The affirmed opinion of the District Court follows Skolnick's version (App. 43a) having decided this issue without benefit of a hearing.

2. Although Mr. Russo swears that he had no knowledge of the true identity or purpose of Skolnick until virtually years later (App. 10a) Skolnick apparently makes an oblique claim that he disclosed his true identity by mention of the Intelligence Division at the very outset (App. 12a). The District Court adopts the Government's version (App. 43a).

3. Petitioner's version notes only a fleeting presence in a prior transaction of a lawyer, not admitted to practice before the Treasury Department, to represent him, such representation having existed only in relation to this other matter (App. 33a-37a). But the Government urges that appropriate representation was present wherever necessary (App. 19a, 26a). The District Court adopted the Government's version (App. 45a).

4. It is petitioner's version that Mack was the conduit through whom the Agent surreptitiously, illegally and unconstitutionally obtained evidence (App. 6a-14a) while the affidavit of Skolnick urges that the bulk of the information was acquired from Mr. Russo prior to Mack's appearance in the matter (App. 22a-24a). The significance of Mack as a conduit for information is manifestly of primary importance and it is to be pointed out that the affidavit of Internal Revenue Agent, John Foley (App. 19a, *et seq.*) supports petitioner's view that Mack was in fact the medium utilized by the Internal Revenue and Special Agents. Having acquired the evidence through Mack, the fact that Skolnick may have been able to acquire the evidence in a legal manner is, of course, irrelevant, *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 64 L. Ed. 319 (1920).

5. If, as it is claimed by Skolnick (App. 22a-24a) all the relevant information was obtained prior to Mack's appearance, how does it happen that no circularization of

income sources was made until August of 1953, long after Mr. Mack appeared on the scene (App. 25a)?

6. Petitioner has characterized the entire transaction as a joint fraud investigation from the very outset. According to the Official Manual of the Internal Revenue Service such a joint investigation is carried on by a Special Agent who is responsible for the procurement of proper proof to establish a criminal charge, in conjunction with an Internal Revenue Agent, who is responsible for the audit features of the case. But the record discloses (App. 15a) a letter from an Internal Revenue Agent in July, 1954, indicating a normal routine civil audit. If, as late as July, 1954, this were merely a routine audit (which type of audit is normally carried on solely by an Internal Revenue Agent, *U. S. v. Wolrich*, 129 F. Supp. 528 (S. D. N. Y., 1955), how does it happen that almost a year earlier Skolnick, a Special Agent, called upon insurance companies to learn the volume of business the petitioner personally did with them (App. 25a)? This internal contradiction casts serious and fundamental doubt upon the practice of the Internal Revenue Service of using innocuous appearing letters from the Audit Division to conceal the activities of a Special Agent in the Intelligence Division.

7. Petitioner has described his appearance with Mr. Mack at Skolnick's office toward the end of the investigation and relates the vital and interesting conversation which took place between Mack and Skolnick with reference to Mack's lack of a Treasury Card showing admission to practice before the Treasury Department (App. 7a, 8a). Skolnick categorically denies that this conversation took place (App. 26a). Despite this sharp conflict the District Court adopts the Government's version (App. 45a).

The motion to suppress was summarily denied without a hearing to resolve these issues of fact and without grant-

ing petitioner the opportunity to take the deposition of the principal witness in order to make his testimony available to the Court. The denial of a hearing was fatally prejudicial to the rights of the petitioner and was error. *Cheng-Wai* v. *U. S.*, 125 F. 2d 915 (2nd Cir. 1942); *U. S.* v. *Manno*, 118 F. Supp. 511 (N. D. Ill., 1954); see dissent of Judge Frank in *U. S. ex rel. Accardi* v. *Shaughnessy*, 206 F. 2d 897, 901 (2nd Cir. 1953) adopted by this Court in reversal, 347 U. S. 260, 97 L. Ed. 681 (1954). Petitioner was entitled to submit evidence and cross-examine witnesses. *Hoffritz* v. *U. S.*, 240 F. 2d 109 (9th Cir. 1956). The denial of petitioner's right to present evidence in support of his application to suppress and to cross-examine the witnesses of the Government in opposition to said application also violated the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure, which provides that the "judge shall receive evidence on any issue of fact necessary to the decision of the motion." *Hoffritz* v. *U. S.*, *supra*. It is fundamental that affidavits are not evidence and that Rule 41 contemplates evidence in its competent sense. *U. S.* v. *Warrington*, 17 F.R.D. 25, 28 (N. D. Cal. 1955).

Compounding the error in the summary resolution of factual issues against petitioner, the denial of a hearing created further prejudice since it deprived petitioner of the subpoena power without which he was unable to obtain the testimony of all the essential witnesses to the transactions complained of in the motion to suppress evidence. At the very time that petitioner was thus immobilized, the Government had available to it to secure testimony on its behalf the grand jury subpoena power and the subpoena powers of the Internal Revenue Service pursuant to the provisions of Sections 6001, 7602 and 7605 of the Internal Revenue Code of 1954; 26 U.S.C. 6001, 7602, 7605. This effect of deprivation of the subpoena power was a denial of due process to petitioner. *Cf. Gordon* v. *Boules*, 153 F. 2d 614 (Em. App. 1946), cert. den. 328 U. S. 858.

The Supreme Court of the United States and other Federal Courts have recently pointed out the necessity of a separate hearing on issues created by a motion to suppress, *Smith* v. *U. S.*, 348 U. S. 147, 151, 99 L. Ed. 192, 197 *et seq.* (1954); *U. S.* v. *Nardone*, 308 U. S. 338, 341, 84 L. Ed. 307, 312 (1939); *U. S.* v. *Manno*, 118 F. Supp. 511 (N. D. Ill. 1954); *U. S.* v. *Coplon*, 185 F. 2d 629, 639 (2nd Cir. 1950), cert. den. 342 U. S. 920; *Cheng Wai* v. *U. S.*, 125 F. 2d 915 (2nd Cir. 1942); cf. *U. S.* v. *Goldstein*, 120 F. 2d 485, 488 (2nd Cir. 1941), aff'd 316 U. S. 114; See *Marsh* v. *U. S.*, 29 F. 2d 172, 173 (2nd Cir. 1942). This view has the very practical basis that issues as fundamental as these should not be tried on affidavits, *Matthews* v. *Correa*, 135 F. 2d 534 (2nd Cir. 1943). It is abundantly clear that where no consent to have the issues determined on the basis of affidavits alone may be inferred, a hearing should be granted, *Hoffritz* v. *U. S.*, 240 F. 2d 109 (9th Cir. 1956); *Lapides* v. *U. S.*, 215 F. 2d 253 (2nd Cir. 1954); *Reszitek* v. *U. S.*, 147 F. 2d 142 (2nd Cir. 1945); *U. S.* v. *Lipshitz*, 117 F. Supp. 466 (E. D. N. Y. 1954)

The failure to grant a hearing also effected a denial of due process to the appellant under the Fifth Amendment to the Constitution, since due process required that the appellant have an opportunity to be heard, to have witnesses on his behalf, to have the right to the subpoena power in order to obtain witnesses, and to have the opportunity to cross examine the witnesses testifying in opposition. *Gordon* v. *Bowles*, 153 F. 2d 614 (Em. App. 1946), cert. den. 328 U. S. 858; *U. S.* v. *Dollar*, 100 F. Supp. 881 (N. D. Cal. 1951), rev'd on other grounds, 196 F. 2d 551; cf. *U. S.* v. *Dillman*, 146 F. 2d 572 (5th Cir. 1945); cf. *Kansas* v. *Occidental Life Ins. Co.*, 89 F. 2d 935 (10th Cir. 1938); cf. *Rosenblum* v. *Rosenblum*, 42 N.Y.S. 2d 626, 629, 630 (Sup. N. Y. 1943).

This right to a hearing is imperative and it would not matter that Rule 41e, ~~Fed. R. Crim. P.~~, does not specifically require that a hearing be held since the right to a hearing

is constitutional. cf. *Clarksburg-Columbus Co. v. Woodring*, 89 F. 2d 788, 790 (App. D. C. 1937), rev'd, 302 U. S. 658, on grounds case became moot.

Accordingly, issues of fact having been presented, the Court below erred in failing to require a hearing.

Despite petitioner's motion therefor, the District Court failed to require, at a hearing or on deposition, testimony of one William Mack, the man who played the central role in the transactions which gave rise to petitioner's motion to suppress. The District Court refused to permit the deposition on the ground that same was not available in a special proceeding of this nature where an indictment had been found even though subsequent to the institution of the proceeding. While the Court of Appeals reversed this erroneous conclusion of law, holding that this proceeding is a civil action in nature, the Court of Appeals nevertheless did not upset the refusal to permit the deposition.

## POINT II

### The acts of Mack and the agents of the Treasury Department violated both state and federal law, and the evidence should have been suppressed.

#### A. The practice before the Treasury Department by Mack and the participation therein by the agents violated the provisions of 5 U.S.C. 261 and the Regulations laid down by the Secretary of the Treasury pursuant thereto.

The Congress of the United States has provided for the establishment of rules and regulations by the Secretary of the Treasury governing recognition, qualifications and enrollment for practice before the Treasury Department. 5 U. S. C. 261, July 7, 1884, c. 334, Sec. 3.23, stat. 258. Congress had provided that as a prerequisite to enrollment and recognition, an applicant show that he is of good character and in good repute, possessed of the necessary qualifications to enable him to render valuable service,

and otherwise competent to advise and assist in the presentation of cases, 5 U. S. C. 261.

Pursuant to the mandate of Congress, a lengthy regulation, embodied in Circular 230, was promulgated, establishing stringent requirements for admission to practice and a puritan code of conduct while enrolled. Reg. Sec. 10.2 et seq. The regulation provides that no one shall be eligible to practice before the Treasury Department unless found qualified and enrolled in accordance with the regulations. Reg. Sec. 10.2. The scope of permitted practice is deemed by the regulation to comprehend all matters connected with the presentation of a client's interest to the Treasury Department, including the preparation and filing of necessary written documents, correspondence with the Treasury Department relative to such interest, as well as the other functions performed by a duly accredited representative. Reg. Sec. 10.2(b).

In the instant matter Mack was engaged solely and uniquely for the purpose of this representation and practice and had never performed any services for the taxpayer prior to this engagement (App. 9a). He purported to perform the services of a duly accredited, enrolled representative to the extent of filing papers, conducting negotiations and urging, as advocate, issues of law and fact for the purpose of obtaining a particular determination by the agents and representatives of the Treasury Department (App. 7a, 11a). Mack's basic disability was known to the agents of the Treasury Department at all times (App. 7a, 10a). His acts as a purported representative thus violated the policy and regulation of the Secretary of the Treasury and were an evasion of the thrust of the statute.

In dealing with the individual known to them to be unenrolled and incompetent, under the law and regulations it would appear that the agents acted contrary to the Congressional mandate embodied in 5 U. S. C. 261, violated the provisions of Circular 230, as amended, and the

Bureau's "Rules of Conduct and Other Instructions for Employees of the Internal Revenue Service."

This utter lack of authority and knowledgeable disregard thereof by the agents is demonstrated by the violation by both Mack and the agents of the provisions of Sections I and II of the Bureau's *Conference and Practice Requirements*, 26 C. F. R. 601.4(d) (1949 Edition). Section II thereof provides:

> "No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney or certified copy thereof from his principal in proper form authorizing him to prosecute the case, claim or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. * * *"

Since Mr. Mack was not enrolled, no power of attorney was ever filed nor was evidence of enrollment ever submitted.

The conduct of which petitioner complains is precisely that against which the rules and regulations, laid down with such great care and deliberation, are directed.

**B. The disclosure of information to Mack by agents of the Treasury in the course of dealing with him violated the provisions of 18 U. S. C. 1905, 26 U. S. C. 7213, and of the Treasury regulations.**

Congress has enacted a stringent and all-pervasive statute whose effect is to prohibit the agents of the Treasury from divulging, disclosing or in any manner making known any information acquired by them in the course

of their official duties and which relates to the amount or source of any income of any person, or permitting any income return or copy thereof, or any book containing any particulars thereof to be seen by any person except as provided by law. 18 U. S. C. Sec. 1905. Violation of this statute by the agents is a crime punishable by fine or imprisonment, or both, as well as by removal from employment. The substance of this portion of the Criminal Code is repeated in the Internal Revenue Code of 1954, Section 7213, 26 U. S. C. 7213.

The exchange of information by the agents and Mack, their discussions with him and their other dealings with Mack, who was both unauthorized and unenrolled to practice before the Treasury Department, constitute a violation of the foregoing statutory inhibition upon such agents against the unauthorized disclosure of information in any manner obtained by them to any other person, except as provided by law.

**C. The practice of Mr. Mack before the Treasury Department and the participation therein by the agents was a crime under the provisions of New York Penal Law, Sections 270, 272, 1936 and 1937.**

The controversy surrounding the propriety of practice by professional people other than attorneys before the Treasury Department rages. (See address of Erwin Griswold, Dean, Harvard Law School, before Convention of American Bar Association, Philadelphia, Pa., August 26, 1955.) The problem of the proper delineation of the tax functions of attorney and certified public accountant may not yet be solved but it has never been contended that one not qualified pursuant to Circular 230 should be permitted to practice at all. The acts of the unenrolled individual in the instant case, are as a matter of law illegal and constitute a violation of the Penal Law of the State of New York.

It is well established that the practice of the law is governed in every jurisdiction by local statutory provisions and compliance therewith is a prerequisite to practice in that jurisdiction. *Bar Association* v. *Dench*, 124 F. Supp. 257 (Virgin Islands 1953).

The New York State Legislature has forbidden the unlawful practice of law (N. Y. Penal Law, Sec. 270) and has made such unlawful practice a misdemeanor (N. Y. Penal Law, Sec. 272). Violation is punishable by imprisonment and fine or both (N. Y. Penal Law, Sec. 1937); *People* v. *Collins*, 271 App. Div. 511, 67 N.Y.S. 2d 53 (1st Dept. 1946). While the performance of incidental tax functions by the accountant regularly and customarily employed by a taxpayer may not, as a matter of business practicality, constitute a violation of the New York statute, it is no longer open to question that the special rendition of professional tax services by one not admitted to the bar does violate the statute when the engagement for the rendition of the services relates to a special matter and is not part of the regular course of accounting services extended by the accountant to the taxpayer in the conduct of his day-to-day business. *In re Bercu*, 273 App. Div. 524, 78 N.Y.S. 2d 209 (1st Dept. 1948), aff'd 299 N. Y. 728. Thus, where as here the taxpayers seeks outside tax assistance from one other than his regular accountant, the statute, the cases, as well as considerations of public protection, require that such person be admitted to practice before the bar. In such situation it would not matter whether or not the person were in fact enrolled before the Treasury Department This rule would seem to have "*a fortiori*" application in a criminal case. The Council of the American Institute of Accountants and the Board of Governors and House of Delegates of the American Bar Association issued a "Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation." This declaration appears in full, among other places, in 40 A. B. A. Jour. 968 iii, *et seq.* (November, 1954). Section 9 of the statement clearly and unambigu-

ously excludes accountants from the "criminal" area of tax practice. The Treasury Department has adopted this view. Interpretation of Section 10.2 of Treasury Department Circular 230.4 P-H Federal Taxes (1956), par. 76,330.

In an affidavit prepared for Mack's signature by Special Agent Skolnick (App. 9a-12a), Mack swore that the taxpayer retained him as an accountant especially for the purpose of representing him in the instant matter. He stated further that "prior to this time I did not do any accounting work for Russo." The facts of this case, therefore, fall squarely within the interdiction of the Appellate Division for the First Department as affirmed by the Court of Appeals of the State of New York in *In re Bercu, supra.*

The Courts in other jurisdictions have passed in excellently reasoned opinions on parallel situations. Even where the "representative" was a certified public accountant, qualified and has been enrolled to practice before the Treasury Department, their acts have been condemned under a rule far more stringent than that which obtains in the State of New York. *Agran* v. *Shapiro*, 127 A.C.A. Supp. 129, 273 P. 2d 619 (Cal. App. 1954); *Gardner* v. *Conway*, 234 Minn. 468 N. W. 2d 788 (Minn. 1951).

These illegal acts, as a matter of fact, were joined in by the agents of the Treasury Department who knew at all times the true status of Mack as an individual unenrolled to practice before the Treasury Department. This is apparent from the failure of Mack to file powers of attorney as required by Circular 230 and the Conference and Practice Regulations. They also knew that Mack was retained specifically for the purpose of this tax investigation since this information appears in the affidavit drawn by Special Agent Skolnick for Mack's signature under oath. Under the provisions of Section 1936 of the New York Penal Law, any person who aided or abetted Mack in his criminal acts is also guilty of a crime punishable under the provisions of the New York Penal Law, Section 1937.

**D. The foregoing violations of law render the evidence, clues and leads therefrom and all other evidence obtained thereby a nullity, and results in its disqualification as a matter of law.**

In dealing with materials, documents, admissions and other evidentiary matters which have been obtained by means of, or as a result of an illegal act, the Courts have decided that the most effective weapon for treating such matter, both in a specific case and as a means of deterring acts of that nature in the future, is the disqualification of the material in question. By thus eliminating incentive, it is thought that the illegal acts themselves will cease to take place. *U. S.* v. *Coplon*, 185 F. 2d 629, 639 (2nd Cir. 1950), cert. den. 342 U. S. 920.

This rule has been applied not only in cases involving a violation of Constitutional rights, *Boyd* v. *United States*, 116 U. S. 616, 29 L. Ed. 746 (1886); *Weeks* v. *United States*, 232 U. S. 383, 58 L. Ed. 652 (1914), but as well in cases where the illegal act involved doing a thing prohibited by statute or rule. *Rea* v. *United States*, 350 U. S. 214, 100 L. Ed. 233 (1956); *Nardone* v. *United States*, 308 U. S. 338, 84 L. Ed. 307 (1939); *U. S.* v. *Coplon*, *supra*.

In the *Rea* case, the Supreme Court of the United States suppressed evidence gathered in violation of law and enjoined its use, stating:

> "* * * (The federal rules) * * * are designed as standards for federal agents. * * * Federal courts sit to enforce federal law; * * * The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards of law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can

flout them and use the fruits of his unlawful act either in federal or state proceedings." (100 L. Ed. 233 at 216.)

The questioned act in the instant matter is the representation of the taxpayer and practice before the Treasury Department in violation of federal statute, regulation and the New York State Penal Law. These questioned acts were joined in by the agents who dealt with the unenrolled individual in full knowledge of the true facts.

In so far as this case presents the issue of an unenrolled, unqualified individual who purports to act as something entirely different with the connivance or consent of the Government agency, it bears striking similarity to cases in which the Supreme Court and other federal courts have struck down evidence obtained by one who assumed one identity but was in fact something entirely different. *Gouled* v. *United States*, 225 U. S. 298, 65 L. Ed. 647 (1921); *Fraternal Order of Eagles* v. *United States*, 57 F. 2d 93 (3rd Cir. 1932).

Because the evidence was acquired by means of violations of law and regulations, the motion to suppress should have been granted.

## POINT III

**The acts of the agents deprived the taxpayer of his rights under the Fourth and Fifth Amendments to the Constitution and of his right to counsel under Constitution and statute.**

The acts of the Government agents in disguising the true nature and purpose of their criminal investigation and in using improper representation of the taxpayer for the furtherance of their purpose, deprived the taxpayer of his constitutional rights under the Fourth and Fifth Amendments of the Constitution and his rights to counsel under both Constitution and statute.

It appears that the Special Agent and Revenue Agents conducted a joint investigation of petitioner's tax returns during the period involved. According to the Official Manual of Instructions of the Internal Revenue Service, the function of the Special Agent in the "joint investigation" was responsibility for the criminal features of the case and for the procurement of proper proof to establish a criminal charge. The Revenue Agent would, of course, only be responsible for the audit features of the case and for the preparation of the record of proof to support an ad valorem addition to the tax. *Russo* v. *U. S.*, 241 F. 2d 285 (2nd Cir. 1957); *U. S.* v. *Wolrich*, 129 F. Supp. 528 (S.D.N.Y., 1955). *U. S.* v. *Lipshitz*, 132 F. Supp. 519 (E.D.N.Y., 1955). The agents forwarded their scheme by using innocuous appearing letters from the Audit Division of the District Director of Internal Revenue rather than from the Intelligence Division (15a, *et seq.*) and the careful deletion of any language indicative of the nature of their investigation from the receipt which they prepared for papers received from William Mack. No affidavit of the Revenue Agent who was caused to sign the seemingly harmless letter was ever before the Court.

The Supreme Court of the United States has been astute to strike down attempts of prosecuting officers and agents of the Government to obtain and use evidence under circumstances having a striking identity with those in the instant case. In *Gouled* v. *United States*, 255 U. S. 298, 65 L. Ed. 647 (1921), a business acquaintance of the defendant working under the direction of superior officers of the Intelligence Department of the Army obtained evidence against the defendant under the pretense of a friendly call. Here the agents of the Treasury used an accountant, named William Mack, in order to obtain evidence against Mr. Russo, evidence which they knew the accountant could easily obtain because of his "representation" of Russo. As in the *Gouled* case the petitioner did not know that his papers had been made available to the Government

for use as evidence against him in a criminal prosecution. It is no longer subject to doubt that evidence thus obtained by stealth, by dissimulation and disguise of purpose, instead of by force or coercion, does violence to the petitioner's constitutional rights. Mack, acting as a conduit of information, apparently played a key role in the consummation of Skolnick's scheme. Once aware of Mack's disabilities, they made ample and continuous use of him to the extent of having made him their deputy.

It is already the well-established law that disclosures obtained during a joint fraud investigation as a result of deception and enticing misrepresentations of the nature which took place here, condemn this whole proceeding as a violation of the rights of the taxpayer under the Fourth and Fifth Amendments to the Constitution. *United States* v. *Lipshitz*, 117 F. Supp. 466 (E.D.N.Y., 1954); *United States* v. *Wolrich*, 129 F. Supp. 528 (S.D.N.Y., 1955); *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D.N.Y., 1955); *United States* v. *Guerrina*, 112 F. Supp. 126 (E. D. Pa. 1954), re-argued 126 F. Supp. 609 (E. D. Pa. 1954); *Hanson* v. *United States*, 186 F. 2d 61 (8th Cir. 1950); *United States* v. *Manno*, 118 F. Supp. 511 (N. D. Ill. 1954); *United States* v. *Rackis*, 119 F. Supp. 687 (D. C. Mass. 954). These cases make it clear that the obtaining of evidence by a Revenue Agent who creates the impression that his activities are merely a routine audit but who is actually engaged in a joint fraud investigation is a violation of the taxpayer's constitutional rights and will give rise to an order suppressing the evidence.

In both the *Wolrich* and *Lipshitz* cases, the fruits of a joint fraud investigation was held subject to an order of suppression upon allegations that the Revenue Agent member of the team represented his activity as a normal routine audit and otherwise caused the taxpayer to believe that he was not engaged in collecting evidence for the purpose of supporting a criminal charge.

Disclosures in the course of a civil audit are obtained by invocation of the compulsion of statute which requires disclosure to Internal Revenue Agents acting in the normal course. Int. Rev. Code of 1939, Secs. 54, 3614, 3615; Int. Rev. Code of 1954, Secs. 6001, 7602, 7605. But consent under the circumstances of a joint fraud investigation is indeed a different matter. See *Nelson* v. *United States*, 208 F. 2d 505, App. D. C. 1953; A. J. Gould, 31 *Dicta* 325, 340 (1954).

So long as the Special Agent's true interest in Mr. Russo's personal returns remained undisclosed and the Revenue Agent's concealed the true nature of the investigation by means of their own identity as Internal Revenue Agents rather than as pawns for the Special Agent, any consent to the surrender of documents or disclosure of information must be deemed involuntary because of the aforesaid provisions of the Internal Revenue Code requiring such disclosures to Internal Revenue Agents conducting a routine audit. See *Union P. R. Co.* v. *P.S.C.*, 248 U. S. 67, 70, 63 L. Ed. 131 (1918); *U. S.* v. *Lantrip*, 74 F. Supp. 946, 949 (E. D. Ark. 1948) and cases cited therein.

Waiver is the intentional voluntary relinquishment of a known right. *Lehigh Valley R. Co.* v. *Ins. Co.*, 172 Fed. 364 (2nd Cir. 1909). The consent must be unequivocal and specific, freely and intelligently given. It is clear that waiver of constitutional rights is not lightly to be inferred, and the burden to show waiver is a heavy one resting on the Government. *Amos* v. *United States*, 255 U. S. 313, 65 L. Ed. 654 (1921); Cf. *Judd* v. *United States*, 190 F. 2d 649 (App. D. C. 1951). The law creates a strong presumption against the implication of waiver of fundamental rights, *Johnson* v. *U. S.*, 333 U. S. 10, 92 L. Ed. 346 (1947), and the withdrawal of the opportunity to choose invokes the presumption and dispels any factual inference of waiver. *U. S.* v. *Reckis*, 119 F. Supp. 687 (Mass. 1954).

A waiver may not be predicated on acts induced by deception and illegality. *United States* v. *Wolrich*, 129 F. Supp. 528 (S.D.N.Y. 1955); *United States* v. *Lipshitz*, 117 F. Supp. 466 (E.D.N.Y. 1954).

The standard of candor established by the charge to the jury approved by the Court of Appeals in *Hanson* v. *U. S.*, 186 F. 2d 61 (8th Cir. 1950) was never met.

Mack's activity in this case continued through and including the appearance of the taxpayer for formal interrogation at 253 Broadway. At this point, as at all other times, this improper representation of the taxpayer was known to the agents and was apparently used by them for the furtherance of their purpose. As a matter of long established law, the taxpayer is entitled to counsel at every stage of the proceeding. *Powell* v. *Alabama*, 287 U. S. 49, 77 L. Ed. 158 (1933); *Thomas* v. *Hunter*, 153 F. 2d 834 (10th Cir. 1946). And such representation must be effective representation. *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 (1938).

In the light of the so-called representation had there, it may well be argued that the proceedings was a farce. Through the acts of its agents, the Bureau committed the same error which a Judge would commit were he knowingly to permit a layman to advise one charged with a crime. The so-called representation of the taxpayer here was so lacking that it became the duty of the Department to recognize it and correct it. See *Diggs* v. *Welch*, 148 F. 2d 667, 670 (App. D. C. 1945).

The right to representation of one who is compelled to appear in person before a government agency or its representative is a right to be accompanied, represented and advised by counsel or other properly qualified and enrolled individual, such enrollment having been accomplished in accordance with the statute and regulations involved. Administrative Procedure Act, Sec. 5(a), 5 U.S.C. 1005(a). This is a requirement of proper and effective representation

when appearance before a Special Agent is enforced by the agency. *Torras* v. *Stradley*, 103 F. Supp. 737 (Ga. 1952); *United States* v. *Smith*, 87 F. Supp. 293 (Conn. 1949). These requirements were not met.

Nor can it be contended that the appellant has waived his right to counsel. Every reasonable presumption will be indulged against the waiver of such a fundamental right and acquiescence in the loss of such fundamental right will not be presumed. *Glasser* v. *United States*, 315 U. S. 60, 86 L. Ed. 680 (1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 82 L. Ed. 1461 (1938); *Butzman* v. *United States*, 205 F. 2d 343, 351 (6th Cir. 1953).

## Conclusion

The denial of the application without a hearing and the refusal to allow petitioner the opportunity to examine William Mack were erroneous.

Both the acts of Mack and the Treasury Agents were illegal under federal and state law. This illegality rendered all the evidence and clues and leads obtained thereby a nullity and results in their disqualification.

The conduct of a joint fraud investigation in the deceptive guise of a routine audit was a violation of the taxpayer's constitutional rights under the Fourth and Fifth Amendments to the Constitution.

The participation of the agents in the purported representation of the taxpayer by one not admitted to practice before the Treasury Department violated the right to counsel as guaranteed by the Administrative Procedure Act and by the Constitution of the United States.

The foregoing illegality and unconstitutionality pervade the entire proceeding and render all the evidence and leads and clues therefrom subject to an order of suppression as prayed for in the order to show cause herein.

For the reason stated, the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

BORIS KOSTELANETZ,
Attorney for Petitioner.

CORCORAN, KOSTELANETZ & GLADSTONE,
JULES RITHOLZ, Esq.,
Of Counsel.

## APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 91—October Term, 1956.

(Argued January 7, 1957 Decided February 8, 1957)

DOCKET NO. 24193

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IN THE MATTER

*of*

The Application of JAMES D. RUSSO, for an Order Declaring Unreasonable, Illegal and Void a Certain Search and Seizure, etc.

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JAMES D. RUSSO,

Appellant,

THE UNITED STATES OF AMERICA,

Appellee.

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Before: CLARK, Chief Judge,

LUMBARD and WATERMAN, Circuit Judges.

Before indictment, petitioner moved under Rule 41(e), Federal Rules of Criminal Procedure, to suppress evidence as illegally and unconstitutionally obtained from him by Treasury officials in an income tax investigation. He also moved to take the deposition of his accountant before the expiration of 20 days after the commencement of the action. The District Court for the Eastern District of New York, Rayfiel, D. J., denied both motions. 19 F.R.D. 278 (E.D.N.Y. 1956). Affirmed.

*Appendix*

CORCORAN, KOSTELANETZ & GLADSTONE, New York City (Boris Kostelanetz and Jules Ritholz, of counsel on the brief), for Appellant.

LEONARD P. MOORE, United States Attorney for the Eastern District of New York, Brooklyn, N. Y. (Kenneth C. Sternberg and Zachary Fromberg, Assistant United States Attorneys, of counsel on the brief), for Appellee.

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LUMBARD, Circuit Judge:

James D. Russo appeals from the District Court's denial of two motions made before indictment: (1) under Rule 41(e), Federal Rules of Criminal Procedure, to suppress evidence because it was obtained in violation of the Fourth Amendment to the Constitution and the statutes governing Treasury Department practice; and (2) to take the deposition of his former accountant, Mack, within twenty days after commencement of the action, pursuant to Rule 26(a), Federal Rules of Civil Procedure.

Before the district court decision, an indictment was filed against Russo for attempted tax evasion and for assisting in the preparation of fraudulent tax returns of others. Internal Revenue Code of 1939, §§ 145(b), 3793(b)(1). On the basis of affidavits alone, Judge Rayfiel concluded (1) that the evidence had been voluntarily and legally disclosed; (2) that since an indictment had been filed, the Rules of Criminal Procedure governed and that under Rule 15(a) of those Rules no good ground for the deposition had been shown. Upon consideration of the facts as set out herein, we affirm the results below.

Russo, in addition to his regular employment as an assistant clerk in the office of the Clerk of the County of Richmond, prepared income tax returns and conducted an insurance brokerage business. During June and July 1952,

Skolnick, a Special Agent of the Internal Revenue Service[1] conferred with Russo in Staten Island and at Skolnick's office at the Intelligence Service headquarters. Although these meetings were largely in reference to the tax returns of others, apparently Russo's own returns were discussed as well.

In September 1952, Revenue Agent Foley[2] was assigned to examine Russo's own returns as well as those prepared by Russo for others. In early 1952, Russo retained as counsel one Frank D. Paulo from whom Foley obtained a waiver of the statute of limitations. In May 1953 Foley contacted Paulo in order to examine Russo's books; also in May, Skolnick had an interview with Russo at which Paulo was present. At this interview, Russo agreed to testify under oath and was probably told of his rights against self-incrimination, although at one time he denied this. Mack, an accountant, not authorized to practice before the Treasury Department, was retained by Russo at this time, with respect to the examination being made by Foley. A 22 page transcript of the interview was signed by Russo on July 2, 1953, which included some discussion of Russo's insurance business and Skolnick followed this up by contacting some of Russo's insurance companies in August 1953.

During this time, Foley was still trying to get Russo's records and at last on October 8, 1953 Paulo gave him permission to get Russo's records from Mack. Foley did get the records, and at Mack's request, returned them to Mack on November 23, 1953.

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[1] The Special Agent is in charge of criminal aspects of tax investigations, Manual of Instructions for Revenue Agents, Para. 678.

[2] A Revenue Agent is responsible for the auditing. Manual of Instructions for Revenue Agents, Para. 678.

What happened thereafter is not clear. Paulo evidently dropped out of the case by December 1954. Mack was apparently in frequent communication with the Treasury people, and in December 1954 or the spring of 1955—the affidavits conflict here—a conference involving Skolnick, Russo and Mack was held. This time Russo refused to testify under oath but did answer questions. In February 1956 the motions herein were filed.

## The Suppression of Evidence

Russo's first contention is that the disclosures were not voluntary because the Treasury agents deceived him into thinking their examination was not for purposes of a criminal charge, but only for a routine civil audit. This seizure by deception is alleged to be a violation of the Fourth Amendment. We think there is nothing to this contention. Not only was there no evidence of any affirmative act of deception by Skolnick or Foley, but the record shows sufficient awareness by Russo that he was himself under investigation and of course this would include the possibility of criminal sanctions.

Russo argues, however, that the evidence came into the hands of the government by virtue of Mack's improper representation of him before the Treasury as Mack was not enrolled to practice before the Treasury. It was thus allegedly obtained in violation of Treasury Regulations. See 5 U.S.C.A. § 261, 26 C.F.R. 601.4(d) (1949 ed.). This contention is equally groundless, for whether or not Mack was technically admitted to Treasury practice, he was Russo's agent and could transmit information to the government in Russo's name. Treasury I. R. Mimeo. No. 58 (Com. No. 6) (1952). There is nothing in the affidavits to indicate that he was acting without Russo's authority. Moreover, it is clear that any evidence transmitted in 1953 was with the sanction of Russo's attorney, Paulo.

Since the voluntary nature of the disclosure is so clear from those portions of the affidavits which are undisputed, the district judge quite properly declined to take any further evidence at a hearing.

**Mack's Deposition**

Although we agree with the trial judge that there was no ground for taking Mack's deposition, the evidence being so clear, we cannot affirm his theory that the Rules of Criminal Procedure governed because an indictment was filed while the motion was pending. Having been filed before indictment, this proceeding was an independent civil proceeding and not merely preliminary to a criminal action. See *Lapides* v. *United States*, 215 F. 2d 253, 254 (2 Cir. 1954); *Weldon* v. *United States*, 196 F. 2d 874, 875 (9 Cir. 1952). Filing the indictment does not change the nature of the proceeding which is determined by the situation at its initiation. Cf. *United States* v. *Pellier*, 43 F. 2d 911 (2 Cir. 1930). Consequently Rule 26(a) of the Federal Rules of Civil Procedure is applicable, and not Rule 15(a) of the Rules of Criminal Procedure.

However, depositions before the expiration of twenty days after commencement of the action under Rule 26(a) are at the discretion of the court, and since it is clear from Judge Rayfiel's opinion that he considered the same factors as would be relevant under Rule 26(a) of the Civil Rules, see *Application of Russo*, 19 F.R.D. 278, 281 (E.D.N.Y. 1956), we see no reason to disturb his order. Moreover, as our disposition of the first motion indicates, we think the substantially undisputed facts in the affidavits are sufficient to dispose of the matter.

Order affirmed.

*Appendix*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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IN THE MATTER

*of*

The application of JAMES D. RUSSO, for an Order Declaring Unreasonable, Illegal and Void a Certain Search and Seizure, etc.

---

JAMES D. RUSSO,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

---

Before CLARK, Chief Judge, and LUMBARD and WATERMAN, Circuit Judges.

On Petition for Rehearing.

CORCORAN, KOSTELANETZ & GLADSTONE, New York City (BORIS KOSTELANETZ and JULES RITHOLZ, of counsel), for Appellant.

PER CURIAM.

Petition for rehearing denied.

C.E.C.,

J.E.L.,

S.R.W.,

U.S.C.J.J.

Filed March 8, 1957.

*Appendix*

## Statutes and Regulations Involved

**5 U.S.C. 261:**

"*Rules for government of agents representing claimants.* The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents and attorneys before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.

"And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner wilfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement. (July 7, 1884, c. 334, Sec. 3, 23 Stat. 258.)"

**18 U.S.C. 1905:**

Sec. 1905. *Disclosure of confidential information generally.*

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made

by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. June 25, 1948, c. 645, 62 Stat. 791."

**26 U.S.C. 7213:**

Sec. 7213. *Unauthorized disclosure of information.*

(a) *Income returns.*

"(1) Federal employees and other persons. It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be

fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

**New York Penal Law:**

"Section 270. *Practicing or appearing as attorney at law without being admitted and registered.*

"It shall be unlawful for any natural person to practice or * * * to hold himself out to the public as being entitled to practice law * * * or in any other manner, or to assume to be an attorney or counselor-at-law, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation * * * and filed the same in the office of the clerk of the court of appeals as required by said section. * * * As amended, L. 1917, c. 783; L. 1939, c. 822, Sec. 1; eff. June 9, 1939."

"Sec. 272. *Violation of certain preceding sections a misdemeanor.*

"Any person violating the provisions of sections two hundred seventy * * * shall be guilty of a misdemeanor. * * *"

"Sec. 1936. *Punishment of accessory to misdemeanor.*

"When an act or omission is declared by statute to be a misdemeanor, * * * every person who aids, or abets another in such act or omission is also guilty of a misdemeanor."

"Sec. 1937. *Punishment of misdemeanors when not fixed by statute.*

"A person convicted of a crime declared to be a misdemeanor, * * * is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

**Department Circular No. 230:**

"Sec. 10.2 *Rules and regulations relating to practice* —(a) *Eligibility to practice.*—(1) No attorney or agent shall be eligible to practice before the Treasury Department unless such attorney or agent is enrolled in accordance with the regulations in this part or prior regulations, * * *"

"(b) *Scope of practice before the Department.*—Practice before the Treasury Department shall be deemed to comprehend all matters connected with the presentation of a client's interests to the Treasury Department, including the preparation and filing of necessary written documents, and correspondence with the Treasury Department relative to such interests. Unless otherwise stated the term 'Treasury Department' as used in this paragraph and elsewhere in this part includes any division, branch, bureau, office or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office or unit."

"Sec. 10.3(a)(3) Applicants for enrollment to practice before the Treasury Department are required by statute to 'show that they are of good character and in god repute, possessed of the necessary qualifications to enable them to render such claimants valuable service,

and otherwise competent to advise and assist such claimants in the presentation of their cases' (5 U. S. C. 261). The burden is upon applicants to establish clearly their right to enrollment by showing that they possess (i) a good character and reputation, (ii) an adequate education, and (iii) a knowledge of the laws and regulations relating to tax matters and other subjects which they expect to handle before the Department and of the rules and regulations governing practice before the Department."

"Sec. 10.6 *Roster of enrollees; enrollment cards*—(a) *Roster of attorneys and agents.*—A roster of all attorneys and agents who make application for enrollment or who are enrolled, or whose applications have been denied, or who have been suspended or disbarred, will be kept in the office of the Committee on Practice. All bureaus, offices and divisions of the Treasury Department * * * are prohibited from recognizing or dealing with any unenrolled attorney or agent as the representative of any person having a claim pending before the Department; * * * And provided further, That an unenrolled person who has not been disbarred or suspended from practice before the Treasury Department may be permitted to make initial appearance in a particular case. Such permission shall in no case authorize an unenrolled person to appear before the Treasury Department in Washington, D. C., or to represent a claimant in any formal hearing. It shall be the duty of the Government official before whom such person appears to notify him that if he wishes to appear further in the case, or in any formal hearing, or before the Treasury Department in Washington, it will be necessary to file an application for enrollment."

"(c) *Enrollment cards.*—The Committee on Practice shall issue an enrollment card to every attorney or agent upon his enrollment. Unless advised to the contrary by the Committee on Practice, any officer of the Treasury Department may consider the holder of such an enrollment card as duly authorized to practice before the Department."

**"Conference and Practice Requirements (26 C.F.R. 601.4 [d]), 1949 Edition * * ***

"b. No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form authorizing him to prosecute the case, claim or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference, who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a power of attorney in proper form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues raised or to any other matter relating to the taxpayer's case."